BOARD OF ALIEN LABOR CERTIFICATION APPEALS
800 K St., N.W.
WASHINGTON, D.C. 20001-8002

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Date: December 22, 1998
Case No: 98-INA-144

In the Matter of:

INDIAN TOUCH, LTD.
Employer

On Behalf of:

ANIL VAID
Alien

Appearance: William Pryor, Esq.
for the Employer and the Alien

Certifying Officer: Dolores Dehaan
New York, New York

Before: Holmes, Vittone and Wood
Administrative Law Judges

JOHN C. HOLMES
Administrative Law Judge

DECISION AND ORDER

This case arose from an application for labor certification on behalf of alien, Anil Vaid ("Alien") filed by Indian Touch, Ltd. ("Employer") pursuant to 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. 1182(a)(5)(A)(the "Act"), and the regulations promulgated thereunder, 20 CFR Part 756. The Certifying Officer ("CO") of the U.S. Department of Labor, New York, New York, denied the application, and the Employer and Alien requested review pursuant to 20 CFR 656.26.

Under 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor ("Secretary") has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified and available at the time of the application and at the place where the alien is to perform such labor; and, (2) the employment of the alien will not adversely

affect the wages and working conditions of the U.S. workers similarly employed.

Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other means in order to make a good faith test of U.S. worker availability.

The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File ("AF"), and any written arguments of the parties.

STATEMENT OF THE CASE

On July 26, 1995, the Employer filed an amended application for labor certification to enable the Alien to fill the position of Import Manager in its Import company.

The duties of the job offered were described as follows:

"Responsible for importation of ladies garments to the United States. Contacts, negotiates and contracts with customers and suppliers, Arranges shipping details such as packing schedule, and routing of products. Expedites correspondences, bid requests and credit collections. Coordinates bank L/C, custom declarations and bill of ladings. Must know current information on import tariffs and currency exchange. Familiar with Indian, Pakistan, Sri Lanka, Dubai, Taiwan suppliers and distributors."

No educational requirements and 2 years experience in the job offered or related job of Export Manager was required. Wages were $45,125.00 per year. The applicant would supervise 0 employees and report to the President. The names of 20 applicants were forwarded by the State employment service. (AF-1-69)

On August 27, 1997, the CO issued a NOF proposing to deny certification. The CO alleged that employer may have violated 20 C.F.R. 656.21(b)(2)in that Employer combined the duties of Importer and Buyer. The CO required documentation by employer that the combination arose from business necessity. Additionally, the CO stated that Employer may have violated 20 CFR 656.21(b)(6) in that seven of the 20 applicants appeared qualified for the job opportunity and were rejected for not lawful or job related reasons. The CO stated that three of the applicants were rejected without benefit of interview because their resumes did not indicate they had experience with ladies garments. Follow-up contact with four applicants showed they were never contacted by Employer. "Applicant Weisman indicates he has experience importing ladies garments from Sri Lanka and Taiwan. Applicant Fischer indicates that he has experience importing from India,

Pakistan and Taiwan." Applicants Macy and Sysler were rejected for no experience with ladies garments. Applicant Sysler was contacted by phone but not given an interview. Applicant Attarian was rejected because Employer contended his references were non-existent therefore his credibility and reliability were questioned. Follow-up with this applicant revealed he had been contacted by phone by Employer and only asked to submit references. Applicant Attarian stated he has experience in all the job duties. The CO required that Employer rebut the rejection of these seven applicants specifically in each instance. Rejection on the basis of lack of familiarity with ladies garments is not an acceptable reason. (AF-76-79)

Employer, September 25, 1997, forwarded its two page rebuttal, which contended that five of the seven applicants had no experience with ladies garments. It concluded: "All of these applicants were rejected due to their lack of experience or verifiable references to perform the job duties of the job position offered which is a lawful reason and job related reason." (AF-75-81)

On October 27, 1997, the CO issued a Final Determination denying certification. In addition to Employer not adequately documenting the necessity for the combination of duties, the CO found: "Employer's recruitment report simply reiterates his original reasons for rejecting all seven (7) U.S. workers and states 'All of these aforementioned applicants were rejected due to their lack of experience or verifiable references to perform the job duties of the job position offered which is a lawful reason and job related reason to reject an applicant.' Employer also failed to address the allegations made by U.S. workers in their follow-up letter replies, as requested."(AF-82-84)

On November 4, 1997, Employer filed a request for review and reconsideration of Final Determination. (AF-85-93)

DISCUSSION

Section 656.25(e) provides that the Employer's rebuttal evidence must rebut all the findings of the NOF, and that all findings not rebutted shall be deemed admitted. Our Lady of Guadalupe School, 88-INA-313 (1989); Belha Corp., 88-INA-24 (1989)(en banc). Failure to address a deficiency noted in the NOF supports a denial of labor certification. Reliable Mortgage Consultants, 92-INA-321 (Aug. 4, 1993). On the other hand, where the Final Determination does not respond to Employer's arguments or evidence on rebuttal, the matters are deemed to be successfully rebutted and are not in issue before the Board. Barbara Harris, 88-INA-32. (April 5, 1989)

Generally, an employer must show that U.S. applicants are rejected solely for lawful, job related reasons as required by Section 656.21(b)(6). Furthermore, the job opportunity must have been open to any qualified U.S. worker 656.20(c)(8). Therefore,

an employer must take steps to ensure that it has obtained lawful, job-related reasons for rejecting U.S. applicants, and not stop short of fully investigating an applicant's qualifications. The burden of proof for obtaining labor certification lies with the employer. 656.2(b); Cathay Carpet Mill, Inc., 87-INA-161 (Dec. 7,1988) en banc. Moreover, the Board has held that an employer unlawfully rejects a U.S. worker who satisfies the minimum requirements specified on the ETA 750A and in the advertisement for the position. Sterik Co., 93-INA-252 (Apr. 19, 1994).

We find the CO was correct in denying certification on the basis that employer had not rebutted the CO's requirement that documentation of lawful reasons for rejection of U.S. applicants be made. Employer simply reiterated his earlier contentions that rejections were lawful, giving no additional documentation or new explanation. Employer thus has totally disregarded the CO's instructions which were clearly reasonable and warranted, since most if not all of the seven applicants appeared to meet at least the minimum standards set out. The CO's findings, thus are unrebutted. Reliable Mortgage, *supra*. We, therefore, need not address other issues raised.

ORDER

The Certifying Officer's denial of labor certification is AFFIRMED.

For the Panel:

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JOHN C. HOLMES
Administrative Law Judge

Judge Wood, concurs in the result but would affirm the CO based on the merits of the case rather than using 656.25(e).